ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272	)	
of the Communications Act of 1934,	)	
as Amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of	)	
Interexchange Services Originating in the	)	
LEC's Local Exchange Area	)	

To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

The implementation of Sections 271 and 272 of the Telecommunications Act of 1996 (the "Act"), as envisioned by Congress, is likely to propel the United States' interexchange market to unparalleled heights of competition resulting in enormous benefits to interexchange consumers. Prior to the passage of the Telecommunications Act, interexchange carriers and the Bell Operating Companies ("BOCs") for years debated whether and when local competition would sufficiently progress so as to obviate the interexchange restriction in Section II(D) of the Modified Final Judgment ("MFJ"). In incorporating Sections 271 and 272 into the Act, Congress essentially put an end to the speculation. The only remaining issues, and the subject of CompTel's comments herein, concern implementation of the separate affiliate and nondiscrimination requirements in a manner consistent with Congress' intent to further enhance vigorous, but fair, competition in the long distance sector.

In these comments, CompTel essentially recommends that the Commission remain faithful to Congress' assessment of the need for regulation of BOC interLATA services. As Congress determined, the BOCs must, at least initially, "operate independently" in the local and interLATA markets. At a minimum, the Commission should supplement the explicit statutory requirements of Section 272(b) with the structural separation safeguards adopted in the *Competitive Carrier Proceeding* and more recently in the *BOC Out-of Region Order* including: (1) separate books of accounting; (2) a prohibition against the joint ownership of transmission or switching facilities with the local exchange companies; and (3) acquisition of the local exchange company's services via the generally applicable tariff used by other unaffiliated competitors.

While the above-mentioned safeguards provide some protection against anticompetitive behavior by the BOCs and their interexchange affiliates, CompTel is concerned that they may prove inadequate. Accordingly, CompTel urges the Commission to employ safeguards similar to those devised by the United States Department of Justice in response to Ameritech's Customers First Proposed. Specifically, CompTel implores the Commission to require the six additional safeguards: (1) that the interexchange affiliate be maintained as a corporation or partnership with separate officers, personnel, accounting books and financial and operating records; (2) that all officers and personnel of the BOC and the interexchange affiliate be compensated based solely upon the performance of the local exchange operations and interexchange operations respectively; (3) that local exchange activities remain solely the responsibility of the BOC and not be delegated in any form to the interexchange affiliate; (4) a general prohibition against the sharing or co-location of facilities, assets and personnel of the BOC's interexchange subsidiary with the regional carrier's local exchange or exchange access services or premises except the leasing of telecommunications equipment space in the same building and sharing power equipment on the same terms, rates and conditions as are available to non-affiliated interexchange carriers; (5) that the affiliate entity not be permitted to use the brand name of the BOC; and (6) that any BOC salesperson who receives inquiries from local exchange customers may not in any way sell, recommend or otherwise market the interexchange services of any interexchange carrier and must administer interexchange carrier selection on a carrier-neutral and nondiscriminatory basis.

Similarly, CompTel proposes that the Commission use the Ameritech Customers First proposed as a guide to implement the joint marketing limitations incorporated in Sections 271(e) and 272(g)(2). CompTel believes that any marketing plan adopted by the Commission should include the following safeguards: (1) a BOC salesperson who receives an inquiry from a local

exchange customer cannot recommend, sell or otherwise market the interexchange service of the interexchange carrier. Salespersons must also administer interexchange services on a carrier-neutral and nondiscriminatory basis; (2) the affiliate interexchange cannot sell the BOCs' exchange service or exchange access service unless those service are tariffed and were established prior to the time the interexchange subsidiary begins to market such services; (3) BOC employees may not advise local exchange customers that the BOC or its affiliate provides interexchange service; (4) the BOC cannot sell or contract a service at any price that is contingent upon the customer obtaining long distance service from the interexchange affiliate; and (5) no joint appearances or presentations by BOCs and the interexchange affiliates except on terms, rates and conditions provided to interexchange carriers not associated with the local exchange customer.

As a structural safeguard to prevent discrimination by the BOC affiliate, CompTel supports the Commission's tentative conclusion to prohibit the transfer of existing local exchange network capabilities from a BOC to its affiliate. If any transfer does occur, the transferee affiliate should become subject to the nondiscrimination requirements of Sections 272(c) and (e). CompTel also encourages the Commission to adopt its tentative conclusion that Section 272(c)(1) is a blanket prohibition against discrimination clearly intended to be a more stringent standard than the general ban on "unjust or unreasonable" discrimination in Section 202(a).

Importantly, CompTel urges the Commission not to extend nondominant regulation to BOC affiliates at this time. CompTel submits that the potential discrimination that may arise in the in-region interLATA market demands more stringent safeguards. Accordingly, the Commission should initially regulate all BOC affiliates as dominant carriers subject to a stringent set of regulations to be gradually reduced over time as the actual marketplace experience permits.

With regard to jurisdictional matters, CompTel agrees that the Commission has authority under Sections 271 and 272 to regulate both interstate and intrastate interLATA services. In any event, however, CompTel also agrees with the Commission that *California III* allows preemption of inconsistent state regulations that interfere with the Commission's authority over interstate interLATA services.

Moreover, CompTel concurs with the Commission's tentative conclusion that the separate affiliate and nondiscrimination safeguards of Section 272 apply to both domestic and international interLATA services. CompTel also concurs that these provisions apply to joint ventures and mergers.

Section 272's separate affiliate requirement should apply to all in-region services except those exempt as incidental under Section 271(g) and those previously authorized under the MFJ. Incidental services include only services for which the fact that a transmission crosses a LATA boundary is inconsequential or insignificant. This exemption should be interpreted narrowly, as should the exemptions previously authorized under the MFJ.

Finally, CompTel agrees with the Commission's tentative conclusion that Section 271(d)(3) augments the Commission power to adjudicate complaints of anticompetitive behavior by the BOCs. To advance the Commission's adjudicatory authority, CompTel submits that the proper standard to establish *prima facie* obligations under the Act requires only that a complainant plead facts, which if true, state a cause of action. Upon establishment of a *prima facie* case, the burden of proof should then shift to the defendant as proposed by the Commission in the *NPRM*. Moreover, all alleged violations should be reviewed on a case-by case basis. Finally, CompTel is in complete agreement with the Commission's tentative conclusion not to employ a presumption of reasonableness in favor of the BOC or BOC affiliates. To do

otherwise, would extend an unwarranted presumption of reasonableness and would likely inhibit the Commission's purpose in promulgating Sections 271 and 272.

BOC offering of interLATA services presents the FCC with many serious regulatory challenges. If the Commission manages this transition successfully, the public will enjoy the benefits of an additional stimulus to the already highly competitive long-distance business. If the Commission handles this task poorly, however, competition will be undermined and the public interest will be harmed rather than helped.

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To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby provides its comments in response to the Commission's *Notice of Proposed Rulemaking (NPRM)* in the above-captioned proceeding.[1] This docket is one of the cornerstones of the Congressionally-mandated transition to a fully competitive and vertically-integrated telecommunications marketplace. Overall, CompTel is in agreement with the majority of the tentative conclusions contained in the *NPRM* and applauds the agency's efforts to manage fairly and reasonably this dramatic restructuring of the telecommunications industry.

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[1] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996).

I. INTRODUCTION

CompTel is a national industry association comprised of competitive telecommunications providers that vary in size from several billion dollars in annual revenue to only a few million dollars. These companies are now faced with a complete reorganization of the telecommunications industry and, consequently, must reassess every aspect of their businesses as a result of passage of the Telecommunications Act of 1996 ("Act").[2] CompTel was intimately involved in the legislative process that led to the passage of this historic legislation and has been an active participant in the Commission's many proceedings implementing the Act.

One of the most important aspects of the Act is its repeal of the consent decree in *United States v. Western Electric* ("MFJ")[3] and, ultimately, the reopening of the interLATA marketplace to the Bell Operating Companies ("BOCs"). BOC offering of interLATA services will present the Commission with many serious regulatory challenges. If the Commission manages this transition successfully, the public will enjoy the benefits of an additional stimulus to the already highly competitive long-distance business. If the Commission handles this task poorly, however, competition will be undermined and the public interest will be harmed rather than helped.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) *(to be codified* at 47 U.S.C. §§ 151 *et seq.*) ("Act").

[3] *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1988); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), *aff'd sub nom California v. United States*, 464 U.S. 1013 (1983); *see also United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ).

CompTel and its members have an obvious and critical interest in this proceeding. While it generally supports the tentative conclusions reached in the *NPRM*, CompTel offers the following detailed comments.

II. SCOPE OF THE COMMISSION'S AUTHORITY (¶¶ 20-29)

The Act requires that the BOCs comply with certain provisions of Sections 271 and 272 prior to providing in-region interLATA telecommunications services. While it is indisputable that the Commission has authority under Sections 271 and 272 to regulate *inter*state interLATA services,[4] the Commission's authority to regulate *intra*state services requires additional explanation. CompTel agrees with the tentative conclusion that the Commission has the authority to regulate *intra*state interLATA services provided by BOCs and their affiliates.[5] If, however, the Commission were to conclude that Sections 271 and 272 were not intended to address both intrastate and interstate services, CompTel also agrees with the Commission that *California III*[6] allows preemption of inconsistent state regulations that interfere with the Commission's authority over interstate interLATA services.[7]

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[4] *See* 47 U.S.C. § 151.

[5] *NPRM* at ¶ 25.

[6] *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

[7] *NPRM* at ¶ 29.

A. The Commission's Authority Pursuant to Sections 271 and 272 Includes Both Interstate and Intrastate InterLATA Services (¶¶ 20-25)

CompTel agrees with the Commission's tentative conclusion that its rules implementing Sections 271 and 272 apply with equal force to interstate as well as intrastate interLATA services. *NPRM* at ¶ 25. Pursuant to the MFJ, LATAs were defined based "upon a city or other identifiable community of interest," without limitation by state boundaries.[8] Because a single state may contain more than one LATA, interLATA communications may be intrastate as well as interstate in nature. Therefore, it is logical that interLATA regulations would apply regardless of whether the communication involved interstate or intrastate services. This conclusion is supported not only by the language of Sections 271 and 272, but also by their relationship to the statute as a whole. Clearly, Congress intended that the Commission have the authority to enforce the statutory safeguards against the BOCs' provision of both interstate and intrastate interLATA services.

When considered along with Sections 251 and 252, the application of Sections 271 and 272 to *all* interLATA services, regardless of their classification as interstate or intrastate, simply makes sense. Recently, the Commission concluded that Sections 251 and 252 apply to *both* interstate and intrastate aspects of interconnection.[9] As the Commission explained, the Act creates a new regulatory framework which is "designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services."[10]

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[8] *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983).

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶¶ 83-84 (rel. Aug. 8, 1996) ("*Interconnection Order*").

[10] *Id.* at ¶ 83.

Given that full compliance with Section 251 is an essential predicate to BOC interLATA entry under Section 271, the two provisions are inextricably linked.[11] Meaningful local competition is the goal of Sections 251 and 252, which, if attained would form the justification for BOC participation in the interLATA market. It follows, therefore, that given the interplay among these Sections, Sections 271 and 272, like Sections 251 and 252, were intended to apply to both interstate and intrastate interLATA services.

Furthermore, CompTel submits that the language of Sections 271 and 272 indicates that Congress intended them to apply without distinction between interstate services. Indeed, the Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area."[12] Thus, a communication is interLATA whenever it terminates outside the originating LATA, without regard to whether the communication crosses state boundaries. Moreover, procedurally, Section 271 applications are considered on a statewide basis, not a regional basis, and require input from the relevant state Public Utility Commission.[13] Thus, it appears that Congress envisioned dual oversight from both the states and the Commission in enforcing the Act's requirements pertaining to interstate and intrastate interLATA services.

In addition, the application of Sections 271 and 272 to interstate and intrastate services is supported by the Commission's new role as administrator of the MFJ. Because the Act substitutes Section 271 for the interLATA line of business restriction in the MFJ, it is reasonable

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[11] *See* 47 U.S.C. § 271(c)(2)(B) (competitive checklist requirements).

[12] 47 U.S.C. § 153(21).

[13] *See NPRM* at ¶ 24 n. 47.

to assume that Congress intended Section 271 to apply to the same scope of services (albeit applying different substantive rules to them) as covered by the MFJ. In fact, as was the case with the MFJ, Sections 271 and 272 do not even refer to interstate or intrastate services, defining instead the restriction in a way that makes traditional jurisdictional distinctions irrelevant.

Any other reading of these Sections would thwart the safeguards established by the Act to address BOC misuse of its local exchange market power. As the Commission noted, "[it is] implausible that Congress could have intended to lift the MFJ's ban on BOC provision of interLATA services without making any provision for orderly entry into intrastate interLATA services, which constitute approximately 30 percent of interLATA traffic."[14] Thus, the only possible conclusion is that the Commission has the authority pursuant to Sections 271 and 272 to regulate both interstate and intrastate interLATA telecommunications services.

B. If the Commission Concludes that Sections 271 and 272 Do Not, In their Terms, Apply to Intrastate InterLATA Services, the Commission Has the Power to Preempt Inconsistent State Regulations (¶¶ 28-29)

As stated above, CompTel agrees with the Commission that its authority clearly applies to *all* interLATA telecommunications services. However, it is also clear that the Commission may legally preempt state regulations that interfere with the Commission's authority to regulate interstate interLATA services. CompTel agrees that structural separation of BOC interLATA operations is one such area where state regulation would interfere with federal policy.

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[14] *NPRM* at ¶ 25. In 1994, 30 percent of interLATA traffic was intrastate. *See* Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Table 6 (CCB Feb. 1996). *NPRM* at ¶ 20 n. 42.

In the *NPRM*, the Commission recognizes that it has authority to preempt state regulation of intrastate telecommunications services when it is impossible "to separate the interstate and intrastate portions of the asserted FCC regulation."[15] This authority allows preemption in situations in which the state's regulatory scheme "negates the exercise by the FCC of its own lawful authority over interstate communication."[16] For example, in *California III*, the court upheld the Commission's preemption of state structural separation requirements for BOC provision of jurisdictionally mixed enhanced services, because state regulation would necessarily negate the FCC's own judgment regarding the appropriate level of structural separation for the BOCs' services.[17]

CompTel agrees with the Commission that under *California III*, the Commission may legally preempt inconsistent state regulation relating to interLATA services. *NPRM* at ¶ 29. As in *California III*, the states may interfere with the Commission's legal authority over interstate interLATA services by establishing different regulation for the same BOC activities regulated by the FCC. Although *California III* concerned state regulation that was *more* stringent than the FCC regulation, the end result of different interLATA services requirements -- whether more or less stringent -- is the same: an impermissible frustration of the Commission's balancing of efficiency and competitive considerations. In particular, less stringent state regulation could allow the BOCs to sidestep critical entry safeguards, thereby

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[15] *NPRM* at ¶ 28; *See also Louisiana Public Service Comm'n v.* F.C.C., 476 U.S. 355 (1986)

[16] *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990) ("California I").

[17] *See California III*, 39 F.3d at 932-33.

negating "valid FCC regulatory goals."[18] It is essential, therefore, that the Commission have the authority to preempt requirements with respect to state regulations that conflict with the Commission's authority in Sections 271 and 272.

III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS (¶¶ 31-40)

As a preliminary matter, CompTel agrees with the Commission's tentative conclusion that the separate affiliate and nondiscrimination safeguards of Section 272 apply to both domestic and international interLATA services.[19] For the provision of interLATA services, the Act does not differentiate between domestic and international calls. Section 271 applies to all "interLATA services"; that is, communication that originates in one LATA and terminate at *any point* outside that area, whether it would be classified as "interstate" or "foreign" under the Act.[20] The key issue is whether the telecommunications services cross LATA boundaries, regardless of whether they are interstate or intrastate, domestic or international.

A. Section 272 Should Apply to All In-Region Services Except Those Exempt as Incidental under Section 271(g) and Those Previously Authorized under the MFJ (¶¶ 36-38)

It is beyond question that the BOCs control local exchange bottlenecks, thereby giving them market power in local exchange services.[21] In the Notice of Proposed Rulemaking

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[18] *See California III*, 39 F.3d at 933; *See also California I*, 905 F.2d at 1243.

[19] *NPRM* at ¶ 32.

[20] 47 U.S.C. § 153(21). Indeed, as explained above, the definition also includes points which would classify the call as *intra*state.

[21] The BOCs' market power was a fundamental premise of the MFJ's interLATA services restriction, and underlies the unbundling provisions of the Telecommunications Act (continued...)

concerning the provision of out-of-region interstate, interexchange services, the Commission recognized the danger that a BOC may gain an "unfair advantage [in interLATA services] . . . because of its ownership and control of local exchange facilities."[22] This potential for impeding competition is of even greater concern in the in-region interLATA market. Accordingly, Section 272 requires that a BOC subject to Section 251(c) provide certain services only through a separate affiliate.[23]

The fundamental protection provided by the separate affiliate requirement disappears, however, if the Commission misconstrues the incidental services exemption of Section 272(a).[24] Although Congress listed in Section 271(g) specific services considered incidental,[25] it is essential that the Commission read the exemption in tandem with Section 271(h). That Section reads:

> "The provisions of subsection (g) are intended to be *narrowly* construed. . . . The Commission *shall ensure* that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[26]

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[21](...continued)
of 1996 as well. *See United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982); Pub. L. No. 104-104, 110 Stat. 56 (1996).

[22] *In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Notice of Proposed Rulemaking, FCC 96-59, ¶ 40 (rel. Feb. 14, 1996).

[23] 47 U.S.C. § 272(a)(1).

[24] 47 U.S.C. § 272(a)(2)(B)(i).

[25] "Incidental services" includes the interLATA transmission of audio and video programming to subscribers, two-way interactive services, commercial mobile services, database access, signalling, and network control signalling. 47 U.S.C. § 271(g).

[26] 47 U.S.C. § 271(h) (emphasis added).

Congress did not intend to render Section 272 a nullity by allowing a BOC to by-pass its requirements through the simple expedient of claiming its service is an "incidental" service. Rather, the Commission should define incidental services to include, as the name "incidental" suggests, only services for which the fact that a transmission crosses a LATA boundary is inconsequential or insignificant. By clarifying the definition in this way, the Commission preserves Congress' intent to protect competition in interLATA services. In addition, a narrow definition of incidental services also lessens the need for non-structural safeguards to protect against misuse of the BOCs' bottleneck power in the provision of incidental services.[27]

In addition to the limited category of incidental services, a separate affiliate is not required for the provision of previously authorized interLATA services, as described in Section 271(f).[28] Essentially, Section 271(f) grandfathers the limited exceptions already granted by Judge Greene.[29] The conditions imposed by the court for these services, of course, should continue to be enforced.[30] Moreover, the BOCs may not expand this limited category of exemptions without meeting the requirements of Section 271. Although there is no separate affiliate requirement, again, it would be consistent with the Act to implement accounting rules

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[27] If incidental services are construed to include services where the interLATA transmission is a predominant feature, it creates the danger that the BOC will use its market power to impede competition. Therefore, safeguards such as accounting rules, disclosure requirements, and reporting/nondiscrimination standards would be necessary.

[28] 47 U.S.C. § 272(a)(2)(B)(iii).

[29] *See United States v. Western Electric Co.*, 569 F. Supp. 990, 1018-1019 (D.D.C. 1983) (corridor exception). United States v. Western Electric Co., 890 F. Supp 1 (D.D.C. 1995) (interLATA wireless services).

[30] *See* 47 U.S.C. § 271(f).

and other non-structural safeguards to limit the BOCs' ability to exercise market power with respect to these services.

B. Sections 271 and 272 Apply to Mergers and Joint Ventures (¶ 40)

Except for the limited category of exemptions described above, the separate affiliate requirement applies to any and all interLATA telecommunications services that originate in a BOC's local service region.[31] A "BOC" is defined as "any successor or assign of any such company that provides wireline telephone exchange service."[32] An "affiliate" is defined as a person that "owns or controls, is owned or controlled by, or is under common ownership or control with, another person."[33] Both mergers and joint ventures result in entities that meet both of these definitions. Although there are many variations on the merger scenario, in all of them, the remaining entity, or entities, is a "successor or assign" of the original BOC. In a joint venture, the entity is "under common ownership."[34]

Thus, if BOCs join together to provide interLATA services, through mergers or joint ventures, the relevant in-region area should be the combination of the previously separate BOCs'

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[31] 47 U.S.C. § 272(a)(2)(B). Certain services are treated as in-region services, pursuant to Section 271(j). Section 271(j)(2), for example, treats as in-region 800 service, private line service, or their equivalents that allow the called party to determine the interLATA carrier. *See also Bell Operating Company Provision of Out-Of-Region Interstate, Interexchange Services*, CC Docket 96-21, Report and Order, FCC 96-288, ¶¶ 45-47 (rel. July 1, 1996) ("*BOC Out-Of-Region Order*").

[32] 47 U.S.C. § 153(4)(B).

[33] 47 U.S.C. § 3(a)(33).

[34] In a joint venture between BOCs, one or both of the BOCs will have an equity interest (or its equivalent) in the joint venture of at least ten percent. *See id.*

in-region states.[35] In other words, CompTel agrees with the Commission that the in-region states of the merged entity should include all of the in-region states of each BOC involved in the combination.[36] The same reasoning applies to joint ventures. Thus, the Section 272 safeguards for services originating in-region apply to all BOC participants in both mergers and joint ventures.

Moreover, it is vital that the separate affiliate safeguards be in effect as soon as the merger or joint venture is announced. As the Commission recognized in the *NPRM*, a BOC has an incentive to discriminate in favor of the interLATA affiliate of the BOC's proposed partner offering services in that BOC's area during the pendency of the merger.[37] The same potential for discrimination exists with respect to joint ventures. Therefore, because anti-competitive incentives exist from the moment that the merger or joint venture is announced, the Commission's rules should apply from that time. This is the only way to ensure that the BOCs will not have an unfair advantage in the interLATA market.

In the *BOC Out-of-Region Order*, the Commission recognized the potential for anti-competitive behavior by the BOCs during the pendency of a merger. The Commission stated: "[I]n the period prior to a merger's consummation, one partner to the merger may act in ways to favor those out-of-region services of its merger partner that originate in the first partner's

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[35] "In-region state" is defined as "a state in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service" pursuant to the MFJ. 47 U.S.C. § 271(i)(1).

[36] *NPRM* at ¶ 40.

[37] *Id.*

service territory."[38] Although the record in that proceeding was insufficient to lead the Commission to adopt permanent rules regarding mergers, the Commission left open the possibility for regulation of proposed mergers in other contexts.[39] In the instant proceeding, the potential for anti-competitive behavior by the BOCs is even greater. Accordingly, CompTel urges the Commission to apply its rules for in-region interLATA services during the pendency of a merger or joint venture. Because both resulting entities are considered affiliates and provide interLATA telecommunications services originating in-region, meaning the area covered by all participating BOCs, the Commission has the statutory authority to apply Section 272 safeguards from the time that the business plan is announced.

IV. STRUCTURAL SEPARATION REQUIREMENTS (¶¶ 55-64)

A. To "Operate Independently" Means More Than the Items Listed In § 272(b)(2)-(5) (¶ 57)

CompTel concurs with the Commission's tentative conclusion that Section 272(b)(1), which requires that separate affiliates operate "independently" from BOCs, imposes requirements beyond those listed in the remainder of Section 272(b). As the Commission points out in the *NPRM*, a fundamental principle of statutory construction is that a statute should be interpreted so as to give meaning to each of its provisions.[40] Because Congress included Section 272(b)(1) in the Act, the Commission must inevitably conclude that the provision was incorporated for a reason -- to require additional mechanisms beyond the items listed in Subsections (2)-(5). To

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[38] *BOC Out-of-Region Order* at ¶ 33.

[39] *Id.* at ¶ 34.

[40] *See NPRM* at ¶ 57.

determine otherwise would violate fundamental canons of statutory construction and severely limit the scope of Section 272(b) as intended by Congress.

To properly implement Section 272(b)(1), CompTel urges the Commission to impose any and all additional requirements deemed necessary to ensure complete segregation of the affiliate interexchange subsidiary as envisioned by the Act. In-region services -- which Congress concluded required more regulation than out of region services -- should at least be subject to an equivalent level of safeguards as applied to out-of-region services. Thus, at a minimum, the Commission should interpret the term "operate independently" to evoke the safeguards adopted in the *Competitive Carrier Proceeding*[41] and most recently in its order permitting BOCs to provide out-of-region interstate, interexchange services pursuant to non-dominant status.[42] These safeguards include: (1) separate books of accounting; (2) a prohibition against the joint ownership of transmission or switching facilities with the local exchange company; and (3) acquisition of the local exchange company's services via the generally applicable tariff used by other unaffiliated competitors.[43]

While the safeguards established in the *Competitive Carrier Proceeding* and the *BOC Out-of-Region Order* provide some measure of protection against anticompetitive and discriminatory

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[41] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor*, First Report and Order, 85 F.C.C. 2d 1 (1980) ("*Competitive Carriers First Report and Order*"); Fourth Report and Order, 95 F.C.C. 2d 554 (1983) ("*Competitive Carrier Fourth Report and Order*"), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications v. AT&T*, 113 S. Ct. 3020 (1993); Fifth Report and Order, 98 F.C.C. 2d 1191 (1984) ("*Competitive Carrier Fifth Report and Order*")(collectively referred to as the "*Competitive Carrier Proceeding*").

[42] *See BOC Out-Of-Region Order.*

[43] *See Competitive Carrier Fifth Report and Order*, 98 F.C.C. 2d at 1198, ¶ 98.

behavior on the part of BOCs, the Commission has recognized that these measures fall short of ensuring adequate separation by the BOC and its affiliates.[44] Thus, to remedy the noted deficiencies, CompTel urges the Commission to employ the safeguards devised by the United States Department of Justice for independent operation of an in-region interexchange affiliate in the Ameritech Customers First Plan.[45] In that situation, the Department required the following:[46]

(1) That interexchange affiliates be maintained as corporations or partnerships with separate officers and personnel, separate accounting books, and separate financial and operating records;[47]

(2) That all officers and personnel of the interexchange affiliate be compensated based solely on the performance of the separate affiliate and the company overall and not on the performance of the BOC's local exchange operations;

(3) That compensation of all officers and personnel of the local exchange company be based on the performance of the local exchange operations and not on the performance of the interexchange subsidiary;

(4) That all local exchange-related activities remain the responsibility of the local exchange company and that the BOC not delegate any responsibility for the performance of such business activities to the interexchange subsidiary;

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[44] *See id.* In addition, these requirements are far less than is required by Sections 272(b)(2)-(5).

[45] In its Customers First Plan, Ameritech sought waiver of the MFJ to offer in-region interLATA services. According to the Commission, that request appears to have been rendered moot by the passage of the Act. *See Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, FCC 96-58, ¶ 4 n. 1 (rel. Feb. 15. 1996).

[46] *See Memorandum of the United States in Support of Its Motion for A Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech*, Civil Action No. 82-0192(HHG) (May 1, 1995) ("*DOJ Modification Decree*").

[47] This provision is consistent with the separate accounting records and officer and personnel requirements embodied in Sections 272(b)(2) and 272(b)(3) of the Act.

(5) No sharing or co-location of facilities, assets and personnel of the BOC's interexchange subsidiary with the regional carrier's local exchange or exchange access services or premises except leasing telecommunications equipment space in the same building and sharing power equipment on the same terms, rates and conditions as available to nonaffiliated interexchange carriers;

(6) That the affiliate entity not be permitted to use the brand name of the local exchange carrier.

(7) That any BOC salespersons who receive inquiries by prospective local exchange customers not sell, recommend or otherwise market the interexchange service of any interexchange carrier and administer interexchange carrier selection on a carrier-neutral and nondiscriminatory basis.[48]

The Ameritech Customer's First Plan presents an appropriate framework for ensuring independent operation of the BOC and its in-region interexchange affiliate. Compared to the separate affiliate safeguards adopted by the Commission in the *Competitive Carrier Proceeding* and applied to out-of-region services, the safeguards employed in the Ameritech Plan are much more inclusive and substantially minimize the BOCs' ability to violate the independent operation requirement. In addition, numerous telecommunications entities, all of whom will be affected by the Commission's decision in this proceeding, pledged full support for Ameritech's Customers First Plan.[49] Thus, in light of obviously stronger safeguards presented in the Ameritech proposal, as well as the general support of these safeguards by the telecommunications industry overall, CompTel urges the Commission to adopt the above-

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[48] This requirement is consistent with Section 272(g)(2) prohibition against joint marketing between the BOC and its interexchange affiliates. As detailed in Section VI(B) *infra*, Section 272(g)(2) requires additional safeguards to fully implement the joint marketing prohibition.

[49] Concurring parties include AT&T, Sprint, CompTel, America's Carriers Telecommunications Association ("ACTA"), MFS Communications, Time-Warner Communications, Electric Lightwave, Inc., the Association for Local Telecommunications Services, and the Consumer Federation of America and Consumers Union. *See DOJ Modification Decree* at 13.

mentioned safeguards as a minimum requirement for independent operation under Section 272(b)(1).

B. Non-Accounting Safeguards Should Include Public Disclosure of All Agreements (¶ 64)

Similarly, CompTel encourages the Commission to utilize the Ameritech Customer First Plan as a guide to effectively implement Section 272(b)(5).[50] Accordingly, the Commission should require a BOC to disclose annually all financial data concerning its interexchange subsidiary as if it were a publicly traded company. Additionally, the BOC should commission and pay for a full annual audit by an independent national accounting firm of the interexchange affiliate. The audit must be made available in full to the FCC, relevant State Commissions and interested parties subject to reasonable terms and conditions as determined by the Commission. Further, the interexchange subsidiary should be required to purchase any inputs or data from the BOC local exchange operations on the same rates, terms and conditions, as are available to non-affiliated carriers. Finally, the BOCs should disclose on a timely basis to interexchange carriers all the inputs and data which are provided to the BOCs' interexchange affiliates.

C. BOCs Cannot Guarantee Debts of Interexchange Affiliates in Any Form (¶ 63)

To ensure the integrity of the separate subsidiary requirement, BOCs must be prohibited from pledging or otherwise incurring debt to secure the financial obligations of their interexchange affiliates. As the Commission points out in the *NPRM*, "[t]his restriction appears to be designed to protect subscribers to a BOC's exchange and exchange access services from

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[50] Section 272(b)(5) states that the affiliate "shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5).